UNCITRAL Developments on Arbitration Agreements in Electronic Form

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The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 10 June 1958)[2] ('*New York Convention*')[3] represents one of the pillars of international trade law. It provides a common framework for the mutual recognition and enforcement of arbitral awards among contracting states, and is, as of 1 May 2005, in force in 135 states, thus being on the way of becoming a convention of universal application.

While the success of the *New York Convention* proves the effectiveness of its provisions, the trade environment has seen significant changes in the almost half century that has elapsed since its drafting. One of these changes is represented by technological evolution. Today, trade heavily relies on an array of technological tools which the *Convention's* drafters could not foresee, and which pose a number of problems also in the legal field.

One set of issues relating to technological innovation touches upon the requirements for the recognition of the arbitration agreement and of the arbitral award. Article II of the *New York Convention* mandates state parties to recognise arbitral agreements in written form, and paragraph 2 of the same article II specifies that 'the term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams'. Moreover, article IV of the Convention requires that, in order to obtain the recognition and enforcement of the award, the applicant shall, at the time of the application, supply, *inter alia*, the original agreement referred to in article II or a duly certified copy thereof.

These provisions, which play a pivotal role in the mechanism of the *Convention*, are open to a number of interpretations *vis-à-vis* their applicability to electronic communications also due to some minor but significant linguistic discrepancies. For example, the use of the term 'include' in the English version of article II(2) of the *Convention* has been interpreted as to indicate that the provision did not exhaustively define the requirements of an arbitration agreement but also allowed more liberal ways of meeting the form requirement. On the contrary, the text of other language versions indicates that the provision exhaustively enumerated the requirements necessary for a valid arbitration agreement and therefore did not originate a more liberal form interpretation. Furthermore, while some courts have interpreted the expression 'an arbitral clause in a contract' contained in the same article II(2) of the

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2. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959). This document and all the United Nations documents subsequently cited in this article are available in the six official languages of the United Nations at the UNCITRAL web site <http://www.uncitral.org/>.
3. Hereafter referred to as both '*New York Convention*' and '*Convention*'.

Convention independently from the expression 'arbitration agreements, signed by the parties or contained in an exchange of letters or telegrams', thus recognising as valid arbitration clauses contained in contracts that were neither signed by both parties nor contained in an exchange of letters or telegrams, other courts took the opposite view and required that both an arbitration clause in a contract and a separate arbitration agreement be signed.[4] The United Nations Commission on International Trade Law ('UNCITRAL'), the body currently promoting the *Convention*, soon became aware of these interpretative problems and asked its Working Group II to start envisaging possible solutions to ensure uniformity of interpretation. This task was undertaken in a broader context, which included, *inter alia*, the revision of article 7(2) of the UNCITRAL *Model Law on International Commercial Arbitration* (1985) to include in the written form requirement of the arbitration agreement all forms of data messages.[5]

Soon it became clear that, on the one hand, there was a need to draft a text of universal application which took into consideration the complexity of technological advances and allowed for future developments, while, on the other hand, any amendment or addition to the *New York Convention* needed to comply with the existing framework, and, in particular, with treaty law, while ensuring the application of the new rules to the largest possible number of existing parties to the *Convention*. An early consensus arose on the possibility to use the notion of electronic means of communication as defined in the UNCITRAL *Model Law on Electronic Commerce* also for the purposes of interpreting the *New York Convention*.[6] To make further progress, the Working Group had a number of options.

First, the *Guide Accompanying the Model Law on Electronic Commerce* hinted, in its paragraph six, at the possibility to use the provisions of the *Model Law on Electronic Commerce* to interpret other existing texts which created an obstacle to international trade by requiring the written form. However, this approach was soon found insufficient due to the fact that the *Model Law on Electronic Commerce* was not universally adopted, and, when adopted, it was with local variations which could originate more interpretative difficulties. Second, the possibility to formally amend the *New York Convention*, or to create a protocol to the same, was suggested. However, this proposal was also objected to due to the practical difficulties arising from the need to ensure participation to the amended instrument by all existing parties. It was felt that the introduction of a new regime would exacerbate the differences in the application of the *New York Convention*, at least for the interim period necessary to have all the parties adopting the amendment, an exercise which could well take a long period of time. A third approach suggested the adoption by UNCITRAL, or by the state parties to the *New York Convention*, of a declaration on the desired interpretation of the relevant provisions of the *Convention*.[7] A fourth alternative referred the matter to a draft convention to facilitate the use of electronic communications in international trade, whose preparation was also under way at UNCITRAL.[8] This last suggestion initially gathered limited support due to the amount of work which was foreseen for the finalisation of the text.

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4. UN Doc. A/CN.9/487, para 53. See also Albert Jan van der Bergh, 'The 1958 New York Arbitration Convention Revisited' in Pierre A Karrer (ed) *Arbitral Tribunals and State Courts: Who Must Defer to Whom*? (2001) 125, 133-139.
5. UN Doc. A/CN.9/508, para 18.
6. UN Doc. A/CN.9/468, para 101.
7. UN Doc. A/CN.9/468, para 103.
8. UN Doc. A/CN.9/468, para 104.

Working Group II discussed these various options during several sessions. In particular, differing views were expressed on the legal effect of an interpretative declaration. According to some delegations, such a declaration would have binding force under treaty law only if it were adopted by a conference of the parties to the *New York Convention*.[9] However, another position stated that such a declaration would have no binding effect under international law, and therefore would not serve the intended purpose.[10] Moreover, it was argued that this declaration could be perceived as interfering with existing case law by supporting one possible interpretation over others. Opinions differed also on the adoption of a formal amendment to the *Convention*. Some opposed this proposal since a formal amendment to the text could also be construed as denying that a liberal and more desirable interpretation would have been permissible under the original language.[11] But, in favor of the adoption of an amending protocol, it was also stated that the dual regime arising from such decision would have been a necessary evil to address the existing disharmony, and one limited in time.[12] In the end, given the number of arguments in favor and contrary to each of the two options, the Working Group acknowledged that it could not reach a consensus and that therefore both had to be kept open for consideration, also in light of the progress made on related topics such as the work on the interpretation and application of the writing requirements in the *New York Convention*, and the work on the draft new article 7 of the UNCITRAL *Model Law on Arbitration*, which is still ongoing.

As these discussions were taking place, Working Group IV (on Electronic Commerce) had made significant progress on the preparation of a *Draft Convention on the Use of Electronic Communications in International Contracts* ('*Draft Convention*'). The purpose of the *Draft Convention* is to offer practical solutions for issues related to the use of electronic means of communication in connection with international contracts.[13] One of the means to pursue this goal consists of eliminating certain obstacles to international trade relating to form and contained in existing international instruments, without formally amending these instruments.[14] It is important to note that, while the *Draft Convention* goal is to facilitate the use of electronic transactions also in areas already covered by other international instruments, it does not formally amend any of these conventions. On the contrary, the *Draft Convention* provides 'a domestic solution for a problem originating in international instruments, based on the recognition that domestic courts already have the power to interpret international commercial law instruments'. Thus, the *Draft Convention* enables judicial bodies of the States where it will enter into force to address issues relating to the use of electronic communications arising in the context of other international conventions.[15]

9. UN Doc. A/CN.9/485, para 62.
10. UN Doc. A/CN.9/508, para 43.
11. UN Doc. A/CN.9/485, para 68.
12. UN Doc. A/CN.9/508, para 44.
13. UN Doc. A/CN.9/577/Add.1, para 24.
14. For a review of these obstacles in a number of trade-related treaties, see UN Doc. A/CN.9/WG.IV/WP.94.
15. UN Doc. A/CN.9/577/Add.1, para 59 and UN Doc. A/CN.9/548, para 49.

Draft article 19 of the Draft Convention lists a number of UNCITRAL-sponsored international agreements to which the Draft Convention would apply. The inclusion of the *New York Convention* in this list was deemed in the interest of achieving progress towards its uniform interpretation. In particular, Working Group II welcomed such reference as a contribute to clarify the written form requirement contained in article II(2) of the *New York Convention*, while avoiding some of the difficulties relating to the adoption of a formal amendment.[16]

The current text of draft article 19 of the Draft Convention reads as follows:[17]

Article 19. Communications exchanged under other international conventions

1. The provisions of this Convention apply to the use of electronic communications in connection with the formation or performance of a contract or agreement to which any of the following international conventions, to which a Contracting State to this Convention is or may become a Contracting State, apply:

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards *(New York, 10 June 1958); […]*

2. The provisions of this Convention apply further to electronic communications in connection with the formation or performance of a contract or agreement to which another international convention, treaty or agreement not specifically referred to in paragraph 1 of this article, and to which a Contracting State to this Convention is or may become a Contracting State, applies, unless the State has declared, in accordance with article 20, that it will not be bound by this paragraph.

3. A State that makes a declaration pursuant to paragraph 2 of this article may also declare that it will nevertheless apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of any contract or agreement to which a specified international convention, treaty or agreement applies to which the State is or may become a Contracting State.

4. Any State may declare that it will not apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of a contract or agreement to which any international convention, treaty or agreement specified in that State's declaration, to which the State is or may become a Contracting State, applies, including any of the conventions referred to in paragraph 1 of this article, even if such State has not excluded the application of paragraph 2 of this article by a declaration made in accordance with article 20.

The effect of this provision is to include in the scope of application of the *Draft Convention* agreements to which the *New York Convention* is applicable, unless a state explicitly indicates the contrary by entering a declaration to this extent. In fact, states parties to the *Draft Convention* may exclude for its scope of application any international agreement, including those listed in draft article 19 paragraph 1. However, such choice would exclude the application of the *Draft Convention* to the use of electronic communications in respect of all contracts to which another international convention

16. UN Doc. A/CN.9/569, paras 73-79.
17. UN Doc. A/CN.9/577.

applies, while the *Draft Convention* does not provide for the exclusion only of certain types or categories of contracts covered by another international convention.[18]

From the substantive point of view, the key provision of the *Draft Convention* is the legal recognition of electronic communications, which are equivalent to written form if the information contained in the electronic communication is accessible so as to be usable for subsequent reference (draft article 9 paragraph 2). The *Draft Convention* defines electronic communication as a communication made by means of data messages, which, in turn, are defined as 'information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy'. The two definitions are inspired by article 6(1) of the UNCITRAL *Model Law on Electronic Commerce* and are in line with the revised draft of article 7(2) and (3) of the UNCITRAL *Model Law on International Commercial Arbitration*.[19] Thus, uniformity is ensured between the international and the domestic arbitration regime, as well as with other UNCITRAL texts.

The *Draft Convention* addresses also another aspect relating to the interpretation of the *New York Convention vis-à-vis* the use of electronic communications. Article IV(1)(b) of the *New York Convention* requires that the party seeking recognition and enforcement of a foreign arbitral award must supply, *inter alia*, an original or a duly authenticated copy of the arbitration agreement. Draft article 9 paragraphs (4) and (5) provide a solution to this issue.[20] The draft text of the two paragraphs reads as follows:

> *4. Where the law requires that a communication or a contract should be presented or retained in its original form, or provides consequences for the absence of an original, that requirement is met in relation to an electronic communication if:*
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> *(a) There exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form, as an electronic communication or otherwise; and*
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> *(b) Where it is required that the information it contains be presented, that information is capable of being displayed to the person to whom it is to be presented.*
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> *5. For the purposes of paragraph 4 (a):*
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> *(a) The criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and*
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> *(b) The standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.*

18. UN Doc. A/CN.9/577/Add.1, para 61, and A/CN.9/571, para 56.
19. UN Doc. A/CN.9/508, para 18 ff.
20. UN Doc. A/CN.9/571, para 129 ff.

It is to be noted that the *Draft Convention* applies only to communications made by the parties in connection with a contract, and therefore it seems to cover the requirement for an original arbitration agreement under article IV(1)(b) of the *New York Convention*, but not the one for an original arbitral award provided for in article IV(1)(a) of the *Convention*.[21]

The *Draft Convention* will be discussed by the Commission at its 38th session, which is to be held in Vienna in July 2005. If adopted, the text will be submitted to the consideration of the United Nations General Assembly at its 60th session, and could subsequently be open for states to become parties.

The current text of the *Draft Convention* furthers an uniform interpretation and application of article II(2) and of article IV(1)(b) of the *New York Convention*, which is also in line with developing arbitral practices. The insertion of dedicated provisions in a more complex text dedicated to the use of electronic communications in international contracts allows to avoid the preparation of a dedicated protocol to the *New York Convention*. However, this solution has also potential disadvantages. First, the current parties to the *New York Convention* will, at least for some time, be divided into two groups depending on their participation to the *Draft Convention*. Second, the additional time requested to examine a complex text like the *Draft Convention* might postpone its acceptance by States and therefore delay the application of the rules relating to arbitral awards. However, these effects could be minimised by a swift endorsement of the *Draft Convention* by the international community, in the interest not only of international arbitration, but also of the promotion of the use of electronic commerce in international trade. It is therefore up to states to set this goal as a priority, foreseeing the major economic advantages that stem out of the adoption of an international legislative framework in line with technological evolution and the development of business practices.

Clearly, a number of issues arising from the use of electronic communications in arbitration agreements fall outside the scope of application of the *Draft Convention*. This is, for instance, the case for online arbitrations, that is, arbitrations in which significant parts or all of the proceedings are conducted by using electronic communications. More generally, despite the contribution of the *Draft Convention* to the matters relating to electronic messages, larger issues loom ahead, such as, for instance, the different interpretations relating to the expression of the consent to arbitrate in particular instances which do not completely fulfill the traditional notion of exchange of letters.[22] Such matters are already on the agenda of UNCITRAL and is the object of the work of the Commission.

21. UN Doc. A/CN.9/WG.II/WP.132, para 11.
22. UN Doc. A/CN.9/508, paras 18 ff.